Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Teamsters Canada Rail Conference,

complainant,

and

Canadian Pacific Railway Company,

respondent.

Board File: 29637-C
Neutral Citation: 2012 CIRB **669**
December 19, 2012

On October 1, 2012, the Teamsters Canada Rail Conference (TCRC or the union) filed an unfair labour practice complaint against the Canadian Pacific Railway Company (CP Rail or the employer) pursuant to section 97(1) of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*) and requested that the Board issue an interim order pursuant to section 19.1 of the *Code*. The application and complaint were referred to the Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members, for determination.

A hearing with respect to the application for an interim order was held on October 19, 2012, following which the Board issued an interim order (Order No. 696-NB), directing the employer to cease and desist from implementing the wholesale cancellation of local agreements, including those already announced, until such time as the Board had dealt with the merits of the union's complaint or a new collective agreement between the parties had come into force.

The parties filed written submissions with respect to the merits of the union's complaint and declined the Board's offer of an opportunity to make oral arguments. Having reviewed the parties' respective submissions, the Board is satisfied that the complaint can be decided on the basis of the written record now before it and exercises its discretion pursuant to section 16.1 of the *Code* to dispense with an oral hearing.

Appearances

Messrs. Michael A. Church and Denis W. Ellickson for Teamsters Canada Rail Conference;
Mr. Ron Hampel for Canadian Pacific Railway Company.

I–Background and Facts

[1] The TCRC is the certified bargaining agent for a unit of running trades employees (locomotive engineers, conductors, trainmen and yardmen) (the LE & CTY unit) and a separate unit of rail traffic controllers (the RTC unit) employed by CP Rail. There are four separate collective agreements applicable to various components of the LE & CTY unit ("General Committee of Adjustment"), all of which expired on December 31, 2011. The collective agreement for the RTC unit also expired on December 31, 2011.

[2] Notices to bargain for renewal of these collective agreements were served on August 31, 2011. When direct bargaining failed to produce an agreement, the employer filed a notice of dispute with the Minister of Labour in February 2012. Conciliation and mediation efforts were unsuccessful and the union commenced legal strike action on May 23, 2012. On May 31, 2012, Parliament enacted Bill C-39, the *Restoring Rail Service Act*, S.C. 2012 c.8 (the *RRSA*). This statute, which came into force on June 1, 2012, terminated the work stoppage and imposed binding arbitration as the mechanism for resolving the terms of new collective agreements between the parties.

[3] An arbitrator was appointed pursuant to the *RRSA* and arbitration proceedings were continuing when, on or about September 10, 17, 20 or 26, 2012 (depending on the General Committee of Adjustment), the employer issued notices purporting to cancel numerous "local agreements" on 30 or 60 days notice and cancelling all verbal agreements effective immediately.

[4] The employer also issued a notice of Technological, Operational and Organizational change (TO&O notice) pursuant to the RTC unit's collective agreement on September 26, 2012. The notice advised the union of changes to take place on or after January 24, 2013, that will result in the abolition of five rail traffic controller positions in Winnipeg. By letter dated September 26, 2012, the employer also notified four RTC employees in Calgary that their positions would be abolished in accordance with the Income Security Agreement.

[5] The TCRC's complaint alleges that the employer's conduct in giving notice to cancel virtually every written and verbal local agreement and the TO&O notice violates the *RRSA* and sections 50(*a*), 50(*b*), 94(1)(*a*), 94(3)(*a*), 94(3)(*b*) and 96 of the *Code*.

II–Position of the Parties

A–The Union

[6] The TCRC explains that, because the employer conducts its operations through numerous terminals situated at various locations across the country, the parties negotiate and enter into local agreements that deal with a variety of issues particular to a given terminal. Many of these local agreements have been in place for decades, although the collective agreements typically permit their cancellation by either party on 30 or 60 days notice.

[7] The local agreements cover a variety of operational subjects and working conditions, including familiarization trips, medical appointments, work train agreements, pool agreements, subdivision agreements, attendance at Rule classes, short calls, switcher agreements, payment for delays, payment for lifting trains, temporary vacancies, compensation and rates, work allocation and entitlement, order of call and release of union officers engaged in union business. The union asserts that these local agreements are critical to dealing with the day-to-day interpretation and application of the collective agreements at each terminal.

[8] The TCRC asserts that, prior to the wholesale cancellation of the local agreements and the issuance of the notices regarding the RTC positions, the employer had never indicated any intention that it would do so. It considers the employer's failure to give notice of its intentions particularly egregious because the parties have been in collective bargaining since October 2011 and have been before the arbitrator since September 1, 2012. It alleges that the employer's

actions constitute bad faith bargaining; violate the statutory freeze imposed by the *Code*; interfere with the administration of the union and its representation of employees; and constitute threatening and intimidating conduct.

[9] The union contends that the *RRSA* effectively imposes a freeze analogous to that found in section 50(*b*) of the *Code*. It suggests that the effect of the legislation is that CP Rail cannot unilaterally change the terms and conditions of employment for the employees in the bargaining units it represents. The union contends that the volume and timing of the purported cancellation of local agreements is outside the normal scope of "business as usual" and that the employer needs to discuss any changes to the employees' terms and conditions of employment with the union while the *RRSA* freeze is in place.

[10] The union relies on a decision of Canadian Railway Office of Arbitration (CROA) arbitrator, Michel Picher, dated September 28, 2012 (CROA Case No. 4117), in which the Arbitrator upheld a grievance filed by the union over a 30-day notice given by the employer to cancel a fatigue management pilot program. In that decision, arbitrator Picher stated:

> In my view the impact of article 6 of Bill C-39 is to remove the ability of the parties to themselves change the collective agreement for the time contemplated within that legislation. I do not see how the preservation of the collective agreement can be viewed as other than the preservation of the terms of the letter of understanding of October 23, 2009. Among its terms is the right of either party to serve thirty days' notice to cancel the agreement. The bill came into effect on June 1, 2012 and must be taken to extend to the various letters of understanding between the parties which must be taken to form part of their collective agreement, including the letter of understanding of October 23, 2009. To put it succinctly, paragraph 6(1) of Bill C-39 effectively placed a longer term on the letter of understanding and removed the ability of either party to sever or truncate that term, at least until such time as a new collective agreement comes into effect. To conclude otherwise would be to allow for a substantial risk of upheaval with respect to the administration of the collective agreement during the sensitive period contemplated by paragraph 6(1) of Bill C-39. The will of Parliament to extend the collective agreement must, at a minimum, be taken as intending to maintain the status quo. To put it differently, the right of the parties to serve thirty days' notice to cancel the agreement of October 23, 2009 is displaced by Bill C-39.

[11] The union argues that, regardless of whether a collective agreement contains express provisions regarding the negotiation or cancellation of local agreements, the *RRSA* prevents the employer from altering the terms and conditions of employment of the bargaining unit members as it purported to do. The union asserts that the employer's actions are not "business as usual". In the past, the employer has given notice of its intent to cancel a particular local agreement; the parties meet and endeavour to resolve the issue; and the cancellation does not take effect until

after the parties have met. The union contends that the employer's wholesale, system-wide cancellation of the local agreements is unprecedented. The union observes that no rationale has been provided by the employer for its actions or their timing.

[12] The union argues that the local agreements are of the same nature as the Letter of Understanding that arbitrator Picher dealt with in CROA Case No. 4117, and that the same principles articulated in that decision should apply to all of the local agreements between the employer and the TCRC.

[13] The union suggests that the TO&O notices issued by the employer to the RTC unit can be distinguished from those relied on by the employer to support its contention that the notices represent business as usual. In the union's submission, in the cases relied on by the employer, the material change notices were unrelated to a labour dispute, were not part of an overall, system-wide initiative, and were not issued while legislation similar to the *RRSA* was in force. The union also argues that Appendices A-37 and A-45 of the RTC collective agreement provide that the Rugby (Winnipeg) RTC office will not be relocated or consolidated with the Montréal or Calgary offices during the term of the collective agreement. The union contends that the extension of the collective agreements mandated by the *RRSA* also extends these guarantees.

B–The Employer

[14] The employer admits that it served notice to cancel a number of local agreements. However, it states that it did not cancel all local agreements at all terminals. Some of the local agreements remain in place. It points out that the local agreements were agreed to at various times, in a variety of locations, by numerous current and former local managers and local chairmen, and had cancellation provisions included within them. Those local agreements that did not contain specific cancellation provisions were modified by a Memorandum of Settlement reached in a prior round of bargaining to include a specific cancellation provision. The employer asserts that none of the local agreements contain a provision stating that they expire on December 31, 2011, or that they form part of the collective agreement.

[15] CP Rail maintains that it has not violated the *Code* or the *RRSA*. It submits that the arbitrator was wrong when he held, in CROA Case No. 4117, that any and all written agreements between

the parties were extended by the provisions of the *RRSA*. The employer asserts that section 6(1) of the *RRSA* only extended the collective agreements between the parties that expired on December 31, 2011 and did not, as the arbitrator found, extend other written agreements between the parties that did not have an expiry date of December 31, 2011. It argues that the *RRSA* does not limit the employer's ability to conduct business as usual, including the right of either party to give notice to terminate any or all of the local agreements on 30 or 60 days notice. It contends that establishing and cancelling local agreements is a normal part of the railway's regular daily operations. It further argues that it is under no obligation to serve notice at the national bargaining table that it intends to change local agreements or that, once a local rule is established, it can only be negotiated out during bargaining for the national agreements.

[16] CP Rail also argues that, notwithstanding the union's assertions to the contrary, the verbal agreements or "gentlemen's agreements" at various terminals that have never been reduced to writing were not extended by the *RRSA*.

[17] With respect to the TO&O notice provided to the RTC unit on September 26, 2012, the employer states that it has merely followed the provisions of the Income Security Agreement by advising the union of a pending change. No one has yet been impacted by the notice. The employer states that the notice was due to a local operations initiative and will not take effect until on or after January 24, 2013, at which time it is anticipated that a new collective agreement will be in place. The collective agreement makes provision for the negotiation of benefits to affected employees. In this regard, the employer argues that the giving of the notice regarding the change that will result in the abolition of the positions in the RTC unit is simply business as usual and is similar to that which the Board found to be permissible in *Canadian National Railway Company*, 2004 CIRB 272.

[18] The employer submits that it has not breached the provisions of the *RRSA* or the *Code*, and that all it has done is exercise the rights it has under the collective agreements in accordance with the business as usual principle. The company relies on the Board's decision in *BHP Billiton Diamonds*, 2006 CIRB 353, in which the Board explained the purpose of section 50(*b*) of the *Code* as follows:

> [36] The essence of that section of the *Code*, which is commonly referred to as the freeze provision, is to maintain a balance between the parties during bargaining by removing an employer's ability to unilaterally change employees' working conditions, rights or privileges (see *Pacific Coast Terminals Co. Ltd. and Vancouver Wharves Limited* (1992), 87 di 113; 17 CLRBR (2d) 238; and 92 CLLC 16,033 (CLRB no. 922)). There are two reasons for seeking this balance. The first is to prevent the employer from lessening the authority of the bargaining agent in the eyes of the employees it represents by modifying terms and conditions of employment or rights and privileges in place. The second is that both parties must be able to bargain from an even footing (see *Purolator Courier Ltd.* (1987), 71 di 189; and 87 CLLC 16,053 (CLRB no. 653)).
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> [37] The exception to the above employer restriction is twofold: when the union gives its consent or where the change is one that respects or falls within the employer's "business as usual" principle. To determine what comes within the concept of "business as usual," requires the Board to look at the overall circumstances of the employer's operations.

[19] The employer submits that there is no underlying anti-union animus motivating its actions, and that the provisions in the collective agreement that enable the union to represent its members have not been affected in any way. It argues that none of its actions can be construed as interfering with the administration of the trade union. It submits that the onus is on the union to demonstrate that the employer has coerced, constrained or intimidated employees to compel them to cease being members of the union, and suggests that there is no such evidence before the Board. The employer submits that simply doing business as usual cannot be a violation of the *Code* and asks that the complaint be dismissed.

III–Analysis and Decision

A–Local Agreements

[20] The written local agreements between CP Rail and the TCRC govern the working conditions, rights and privileges of the bargaining unit members in the particular terminal to which they apply. These agreements make it possible for the local union representatives to advise union members as to how the collective agreement will be interpreted and applied in their terminal. It also permits the local union representatives to determine, with some degree of confidence, whether there are grounds for a grievance at the local level over a particular employer action. In this regard, the written local agreements are an important aspect of the union-management relationship, as they contribute to the effective administration of the trade union and its representation of employees in the bargaining unit.

[21] In *Bell Canada*, 2001 CIRB 116, the Board held that an employer's unilateral implementation of a policy affecting the employees' terms and conditions of employment conflicts with the union's representation of its members. In the Board's view, CP Rail's wholesale cancellation of the majority of local agreements constitutes a similar interference with the TCRC's ability to represent the members of its bargaining units. Furthermore, the cancellation of the local agreements that deal with time off for local union representatives to conduct union business also interfered with the representation of employees by the TCRC.

[22] In the Board's opinion, the cancellation of the local agreements will have a substantial impact on the members of the bargaining unit and their bargaining agent. The employer has not demonstrated any compelling business reasons for its wholesale cancellation of the local agreements. The Board therefore finds that the wholesale cancellation of the local agreements by the employer constitutes a violation of section 94(1)(*a*) of the *Code*.

[23] The union had also alleged that the employer's actions constitute a violation of sections 50, 94(3)(*a*) and (*b*) and 96 of the *Code*.

[24] The Board is unable to find that section 6 of the *RRSA*, although clearly aimed at restoring the *status quo* between the parties as it existed prior to the work stoppage, had the effect of reviving the statutory freeze set out in section 50(*b*) of the *Code*. That statutory freeze had clearly expired as of the date on which the work stoppage commenced. Given the Board's ruling regarding section 94(1)(*a*) of the *Code* and the remedial order associated with that ruling, the Board does not consider it necessary to determine whether the *RRSA* implemented a new, independent, statutory freeze as of the date on which it came into force.

[25] The Board was not provided with any evidence to support the contention that the employer's actions were intended to or actually did intimidate, threaten or coerce any members of the bargaining unit. Accordingly, the portions of the union's complaint alleging violation of sections 94(3)(*a*) and (*b*) and 96 of the *Code* are dismissed.

B–TO&O Notice to RTC Unit

[26] In contrast to the cancellation of the local agreements, the employer's action in issuing a TO&O notice to the RTC unit did constitute business as usual. Although, as the union contends,

the guarantees contained in the appendices of the RTC collective agreement which provide that the Rugby (Winnipeg) RTC office will not be relocated or consolidated with the Montréal or Calgary offices during the term of the collective agreement, were effectively extended by section 6 of the *RRSA*, it was not unlawful for the employer to give advance notice of changes that will take place after the expiry of the collective agreement as extended by the *RRSA*.

IV Conclusion and Remedy

[27] The Board has found that the employer's actions in cancelling a large majority of the local agreements at the time and in the manner that it did, violated section 94(1)(*a*) of the *Code*. The parties will find attached an order directing the employer to cease and desist from the wholesale cancellation of local agreements and to reinstate the local agreements that were cancelled.

[28] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Daniel Charbonneau
Member

Robert Monette
Member